reasons therein stated" and thus obviously embraced Justice Black's decision of the federal question. In addition, Justice Souris said (App. A-11, p. 63):

> "The essential facts and *principal questions* presented by the appeal are stated fully and accurately in the opinions of Justices DETHMERS and BLACK appearing at 376 Mich 135, 138, 143." (Emphasis added.)

The contention of Appellees that the decision of the State Court rested on independent and adequate non-federal grounds is entirely without substance. The decisions relied upon by the Appellees do not support the motions for which they are cited, and in fact support the jurisdiction of the Court over the subject matter of this appeal.

(2) THE FEDERAL QUESTIONS PRESENTED ARE SUBSTANTIAL AND REQUIRE A DECISION BY THIS COURT.

The federal bases for the State Court's decision having been established, it is clear that the motions of Appellees to dismiss or affirm rest upon their remaining claim that the federal questions involved in the appeal are lacking in merit. To the extent that such questions have merit, the Appellees apparently concede their grave public importance and the overwhelming need for their final resolution by this Court.

Many of the arguments advanced by the Appellees on the merits were anticipated and met in the Jurisdictional Statement and will not be discussed in this reply. However, brief rejoinder will be made on the following points:

(a) The states are not free to grant unemployment benefits regardless of the impact on labor disputes affecting interstate commerce.

The Commission's motion makes the following flat assertion (p. 23):[3]

> "No constitutional prohibition, we submit, would, therefore, prevent the Michigan legislature, if it so chose, from amending its labor dispute disqualification provisions so as to allow the payment of unemployment benefits to strikers while they are on strike."

In support of this claim of absolute state sovereignty, the Appellees rely principally upon the following decisions of this Court: *Southern Pacific Co. v. Arizona;* 325 U.S. 761, *Carmichael v. Southern Coal & Coke Co.,* 301 U.S. 495, *International Union v. Wisconsin Board,* 336 U.S. 245, and *Labor Board v. Gullett Gin Co.,* 340 U.S. 361.[4] Stated cryptically, the decisions will not sustain the proposition for which they are cited.

The *Southern Pacific* case involved the constitutionality of a state law regulating the length of trains. Unlike the case at bar in which the federal labor law undeniably preempts the field of labor disputes affecting interstate commerce, the federal Interstate Commerce Act was held not

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[3] The same assertion is made in the Claimants' motion at page 27. If these assertions are true, it would also follow that state laws could be passed to aid employers in labor dispute situations by tolling state taxes during strikes and stoppages caused by strikes, or reimbursing employers for lost earnings.

[4] A few lower federal and state court decisions are also cited, but they add nothing to the Supreme Court decisions and do not warrant individual treatment. It should suffice to state that the lower court decisions are no more helpful to the position of Appellees than the decisions of this Court upon which they rely.

to be preemptive. However, the state law was nevertheless struck down under the Commerce Clause of the Constitution. In its decision the Court observed that states do not have power to regulate phases of interstate commerce where uniformity of regulation under a single authority is required (p. 767), and, after reasserting the power of Congress to exclude states even on purely local matters which affect interstate commerce (p. 769), the Court concluded (pp. 779-780):

> "The principle that, without controlling Congressional action, a state may not regulate interstate commerce so as substantially to affect its flow or deprive it of needed uniformity in its regulation *is not to be avoided by 'simply invoking the convenient apologetics of the police power,'*" (Emphasis added.)

In the instant case, we have a preemptive federal enactment regulating labor disputes under a single authority. We also have a state law which, while not purporting to regulate such disputes directly, nevertheless exercises a powerful regulatory influence by compelling the payment of benefits to one party to such disputes at the ultimate expense of the other, contrary to the federal law. This result is admittedly achieved by ignoring the direct involvement of unemployment claimants in a labor controversy, unless the dispute is found to exist within the claimants' establishment *by state definition*.[5] The difficulty with the Commission's position is that in its concentration on the unemployment compensation aspect of the state law, it is oblivious to the disruptive impact which the payment of

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[5] Commission's motion p. 24-25, Opinion of Justice Souris, App. A-11, p. 65-66, *Park v. E.S.C.*, 355 Mich 103, 131-132, 94 N.W. 2d 407. The Commission and obviously the Michigan Court openly maintain that the state is not bound by the federal definition of "labor dispute" and may adopt its own narrower definition in assessing the right of strikers or other disputants to benefits.

benefits to employes involved in a labor dispute inevitably has on the relative bargaining positions of labor and management. Under the doctrine of the *Southern Pacific* decision, where a state refuses to recognize such obvious invasion of a federally preempted field, it becomes the duty of this Court to intervene under the Supremacy and Commerce Clauses in the interest of enforcing the preemptive federal law.

The *Carmichael, International Union,* and *Gullett* decisions likewise fail to support the claim of absolute sovereignty made for the state law. *The Carmichael* decision concededly endorsed the power of the states to enact compensation laws in the unemployment field. It did not, however, authorize and sanction any state enactment, regardless of its encroachment upon the federally preempted field of labor disputes affecting interstate commerce. The *International Union* decision involved coercion, injury to property and intimidation of employes which placed the concerted conduct outside of the protection of the federal labor law. No such exclusion from the area preempted by the federal law is existent in this case.

The *Gullett* case is even less in point. The sole issue in that case was whether the federal Labor Board abused its discretion by not deducting unemployment benefits in ordering back pay to an employe whose rights had been infringed under the federal law. The case did not involve a conflict between state and federal law, or the encroachment of a state law upon a federally preempted field. On the other hand, the Court did observe that the implementation of the federal law could not be made to depend upon the "myriad provisions" of state unemployment laws, thus tacitly recognizing the preemptive operation of the federal law.

The absolute sovereignty claimed for the state in determining the right to unemployment benefits of strikers or

other employes involved in labor disputes cannot be sustained. Accordingly, the competing demands of federal and state interests, resolved by the Michigan Court adversely to federal law, should be reappraised and accommodated by this Court.

(b) The arguments advanced by Appellees to invalidate Paragraph 118 are untenable.

The Appellees rely upon several arguments to support the Michigan Court's invalidation of Paragraph 118 by operation of the state law, none of which will withstand close scrutiny. In essence, the Appellees contend (1) that Paragraph 118 purported to set up a fictional labor dispute in the Claimants' plants and, therefore, could be disregarded by the Commission in finding the controlling facts, (2) that the *Oliver* and *Taylor* cases[6] relied upon by Appellant are inapposite, because Paragraph 118 did not involve a mandatory subject of bargaining and, in any event, the overriding state statute was a health and welfare law, and (3) that Paragraph 118 constituted an unlawful attempt to reverse the definition of the term "establishment" in the state law previously enunciated by the Michigan Court in the *Park* case.[7]

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[6] *Teamsters v. Oliver*, 358 U.S. 283; *California v. Taylor*, 353 U.S. 553.

[7] *Park v. E.S.C.* (*supra*) The Claimants also allege: "Appellant *stated below* that Paragraph 118 was designed to relate to . . . [an] attempted waiver of benefits," referring to a portion of the oral argument of counsel before the Appeal Board. This assertion does not correctly represent the facts. No such "statement" was made by or on behalf of the Appellant. The Court is referred to pages 469a, 470a-471a and 476a-477a of the printed Joint Appendix if it desires to review the actual statements of counsel, but respectfully reminded that the question of whether Paragraph 118 constitutes a "waiver" under the state law is no longer open to debate, having already been decided by the state court in the affirmative, not because of any evidence of intent or stipulation of counsel, but solely due to its legal effect of identifying the Claimants as parties to the dispute.

In respect to Appellees' first argument, a very brief historical reference must be undertaken in order to place Paragraph 118 in its proper perspective. The record shows that the International Union, UAW was first certified by the National Labor Relations Board as the exclusive representative of hourly rated production and maintenance employes in a number of General Motors plants in 1940. This was done by a separate election and separate certification for each plant.[8] Following these certifications the Union requested a single national agreement instead of a separate agreement for each plant, but the Company refused.[9] However, later in 1940 the parties agreed upon a single national agreement which gave the Union the standard terms of employment it desired and provided the Company the protection of a limited no-strike clause of which Paragraph 118 was a part.[10]

In view of the national bargaining unit which was established by this national agreement,[11] it was logical for the parties to agree by Paragraph 118 that a strike in any one plant during the contract term would extend to all affected plants within the unit. This agreement realistically defined the scope of strikes within the national unit, recognizing the direct interest of all employes covered by the unit in matters negotiated in any part thereof, and protecting the unit against fragmentation by selective strike action.

In the factual background presented to the Commission, the Appeal Board and the Court, therefore, Paragraph 118

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[8] Printed Joint Appendix, p. 358a. See also 24 NLRB 159.

[9] Printed Joint Appendix, p. 360a.

[10] Printed Joint Appendix, p. 355a, 431a.

[11] The national unit was certified by the NLRB in 1958. See Jurisdictional Statement p. 26, footnote 79.

in providing that the Michigan Claimants were participants in the dispute did not require the adoption of a fiction. Paragraph 118 merely endorsed the facts as they existed by precluding any finding that a purely local strike or a purely local labor dispute existed at the Ohio plant to the exclusion of other parts of the national bargaining unit, particularly in a situation where the negotiations involved union demands for changes in the national agreement which would directly benefit the Michigan Claimants.

Recognizing these realities, the Referee and the Appeal Board initially found that the labor dispute extended to the Michigan plants, saying that Paragraph 118 was not "a collusive agreement that unemployment compensation benefits be waived." (App. A-1, p. 13, App. A-3, p. 34). The Circuit Court affirmed this finding (App. A-5, p. 39). Without a scintilla of supporting evidence, the Michigan Supreme Court reversed this finding as a matter of law. In doing so, it fragmentized the national bargaining unit and established separate local plant units for unemployment compensation purposes which it termed "establishments." Such action was in open disregard of the 1958 certification of the National Labor Relations Board which established a national unit in light of the system of national bargaining historically practiced by the union and the company. As observed under similar circumstances in *International Union v. O'Brien,* 339 U.S. 454, 458-459:

> "Though the unit for the Michigan strike vote cannot extend beyond the State's borders, the unit for which appellant union is the federally certified bargaining representative includes Chrysler plants in California and Indiana as well as Michigan. *Chrysler Corp.*, 42 N.L.R.B. 1145 (1942). Without question, the Michigan provision conflicts with the exercise of federally protected labor rights. *A state statute so at war with federal law cannot survive.*" (Emphasis added.)

Contrary to the contentions of the Appellees, Paragraph 118 was consistent with the facts and supported by the findings of the Appeal Board and the overwhelming weight of the evidence. It correctly identified the Michigan claimants as parties to the dispute and was binding upon the State Court under the imprimatur of federal law.

The second argument designed to distinguish the *Oliver* and *Taylor* cases is equally untenable. The contention that Paragraph 118 was simply the *quid pro quo* for a national agreement and, therefore, not a mandatory subject of bargaining ignores the fact that the paragraph was also an integral and lawful part of the "no-strike" clause, on which bargaining was mandatory. Moreover, it is clear that a demand to establish standard terms of employment within numerous plants of a single employer by a national agreement is also a mandatory subject of bargaining. *Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676, 688, 712-715, *Mine Workers v. Pennington*, 381 U.S. 657, 664.[12] Accordingly, whether the paragraph was negotiated as a part of the no-strike clause or the demand for a national agreement is immaterial.

The test of a mandatory subject of bargaining as enunciated in the *Jewell Tea* decision, depends not upon the form of the agreement, but upon the impact which the agreement will have on the interests of members of the bargaining unit (p. 690, footnote 5). In that case the demand in question was for a limitation on the marketing hours of stores in which union members worked. The Court held that the demand was sufficiently related to the subject of hours

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[12] The *Pennington* case involved the balancing of federal labor law policy against federal anti-trust policy. It did not involve the doctrine of federal preemption or a conflict between state and federal law. It, therefore, has no direct precedential value in this case, despite its citation by Justice Black. (App. A-10, p. 58, footnote 11).

of work to fall within the protection of the federal labor policy as a mandatory and lawful subject of bargaining (p. 689-690). The Court also reaffirmed its decision in the *Oliver* case in which it had held that a demand for fixing the prices at which employers could supply leased vehicles was a lawful and mandatory subject of bargaining, since the demand was not "a remote and indirect approach to the subject of wages . . . but a frontal attack upon a problem thought to threaten the maintenance of the basic wage structure established by the collective bargaining contract." (p. 690, footnote 5).

In the instant case, the provisions of Paragraph 118 were not a "remote and indirect" approach to preservation of the national agreement with its standard terms of employment and the national bargaining unit, nor to the preservation of labor peace during the contract term by an adequate no-strike clause. Paragraph 118 made a direct frontal attack on problems which the parties feared might threaten their historic bargaining relationship by providing that employes who became unemployed as a result of an authorized strike at some other plant within the bargaining unit would be participants in the strike and, therefore, would not be entitled to wages, seniority, holiday pay, vacation pay, supplemental unemployment compensation, or other benefits. The paragraph thus obviously insured that the strikers would be supported by all affected members of the bargaining unit, and that the company would not be forced by selective strike action to finance a strike against itself.

It is apparent from the foregoing that Paragraph 118 covered a mandatory subject of bargaining. However, this distinction is not crucial to a decision of this case. As noted in the Jurisdictional Statement (p. 22), a permissive subject of bargaining when agreed upon by the parties is also enforceable.

Certainly, the distinction between mandatory and permissive subjects of bargaining was not a criterion in the Michigan Court's decision. In Justice Black's opinion for the majority (App. A-10, p. 56) reference is made to the reversal of *I. M. Dach Underwear Co. v. ESC.*, 347 Mich 465, 80 N.W. 2d 193, by the decision in *MESC v. Vulcan Forging Co.*, 375 Mich 374, 134 N.W. 2d 749. In the *Vulcan* case the Court held that a vacation clause in a collective bargaining agreement which required the employer to shut down for two weeks did not disqualify employes whose seniority was insufficient to entitle them to vacation pay. Despite the fact that vacation clauses are unquestionably mandatory subjects of bargaining, the Court refused to find such employes voluntarily unemployed by the agreement of their union.

We turn briefly to the argument that the state statute here involved is exempt from the rule enunciated in the *Oliver* and *Taylor* cases because it is a health and welfare law. It is difficult to see how an unemployment compensation statute which is designed to protect involuntarily unemployed persons is any more a health and welfare law than an anti-trust statute which is designed to protect the consuming public from monopolistic trade practices. Both are enacted under state police power, and, as noted by this Court in the *Southern Pacific* case *(supra)*, the prohibition against a state's regulation of interstate commerce where uniformity of regulation is required cannot be avoided merely by invoking "the apologetics of the police power."

The final argument offered by the Appellees to distinguish the *Oliver* and *Taylor* cases rests on the charge that Paragraph 118 constituted an effort to reverse the definition of "establishment" handed down by the State Court in the *Park* case. This rationale is also difficult to follow,

since Paragraph 118 has been included in successive contracts since 1940, while the *Park* case was not decided until 1959. In any event, it is self-evident that Paragraph 118 does not purport to amend the state statute, but instead lawfully deals with the scope of labor disputes and strikes within the national bargaining unit in light of the facts and circumstances there existent.

The conclusion is clear and unmistakable. The *Oliver* and *Taylor* cases cannot be distinguished from the case at bar on any of the grounds invoked by the Appellees. Therefore, applying the governing rule of those cases, Paragraph 118 does carry the imprimatur of the federal labor law and should have been given effect by the State Court without regard to the waiver clause in the state statute.

(c) The cases cited by Appellees as precedent for dismissing this appeal are not in point.

The Claimants cite *Ford Motor Co. v. Alexander Park,* 360 U.S. 251, and *Lawrence Baking Co. v. U.C.C.,* 323 U.S. 738, as precedent for dismissing this appeal. An examination of the petitions for certiorari in those cases clearly shows that the grounds upon which the jurisdiction of the Court was sought were entirely different from the grounds asserted herein on appeal by the Jurisdictional Statement. Accordingly, the denial of certiorari in those cases should be disregarded by the Court in its decision to exercise its jurisdiction in this case.

CONCLUSION

For the reasons stated in the Jurisdictional Statement and in this Brief, the Appellant respectfully requests that the Court reject Appellees' Motions to Dismiss or Affirm and accept this case for oral argument.

Respectfully submitted,

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